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SUPREME COURT, U. S.

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No. 319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York, *Appellants,*

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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Appellants,

v.

JEROME T. ORANS, *et al.*,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

Appellants pray that this Court grant rehearing of its decision of October 11, 1965 dismissing the above-captioned appeal, 86 Sup. Ct. 75, and that probable jurisdiction be noted and the judgment from which the appeal is taken be reversed, as set forth in the Jurisdictional Statement filed July 3, 1965 herein.

REASONS FOR GRANTING REHEARING AND NOTING PROBABLE JURISDICTION

The New York Constitution of 1894, which provided the scheme of State legislative apportionment prior to *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, provided, *inter alia:*

(a) ". . . The assembly shall consist of one hundred and fifty members. . . ." (Article III, § 2); and

(b) "... Every county heretofore established and separately organized, except the County of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member...." (Article III, § 5).

This Court held in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, that the apportionment scheme which included these two provisions did not and could not meet the requirements of the Fourteenth Amendment to the Federal Constitution under the one-man, one-vote principal enunciated in *Reynolds* v. *Sims,* 377 U. S. 533.

Quite plainly the 150-member requirement by itself does not violate the Fourteenth Amendment. But if the Assembly is limited to 150 members, it is mathematically impossible for any apportionment scheme to comply with both the requirement of separate county representation and the one-man, one-vote requirement.*

Quite plainly, also, the requirement of separate county representation by itself does not violate the Fourteenth Amendment. But if each county receives at least one Assemblyman, it is likewise mathematically impossible for any apportionment scheme to comply with both the 150-member requirement and the one-man, one-vote requirement.*

Faced with these competing impossibilities, and believing itself free of either of these requirements of the invalid apportionment scheme, the Legislature adopted four alternative reapportionment plans, none of which complies precisely with the 150-member requirement, and two of which do not comply with the separate county representation requirement. The appellees in this case chose to attack the

*See Appendix hereto for an analysis supporting these conclusions.

plans in the State courts for failing to comply with the 150-member requirement. The New York Court of Appeals upheld them, and we appealed to this Court.

By the logic of its decision the New York Court of Appeals would have been equally obliged to decide for the petitioners if they had chosen instead to attack two of the plans for failure to comply with the separate county representation requirement.

This Court, in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, did not state that either the 150-member requirement or the separate county representation requirement, by itself, was unconstitutional; it merely held that the two requirements in combination were bound to produce an unconstitional result. The New York Court of Appeals, however, concluded that this Court had invalidated the separate county representation requirement but not the 150-member requirement. It based this erroneous conclusion upon its finding that the 150-member requirement was not "directly passed on" by this Court but was merely referred to in a "passing reference." *Matter of Orans,* 15 N. Y. 2d 339, 346-349 (1965). This, however, is not accurate. This Court both considered and directly passed on the 150-member requirement. 377 U. S. at 636, 638, 641, 645-647, 654. The Court of Appeals' decision thus rests not upon an interpretation of State law, but upon an erroneous reading of this Court's decision in the *WMCA* case. That court might as easily have said that this Court invalidated the 150-member requirement and made only a "passing reference" to the separate county representation requirement.

The Court of Appeals went on to hold, 15 N. Y. 2d at 350, that:

> "The only other justification for excising the 150-member constitutional provision would be a showing that the Supreme Court's mandate for

> equally populated districts could not be obeyed if the Assembly districts numbered exactly 150. No such showing is made or can be made. Difficulties there will be . . . but there is no impossibility."

It is equally true, of course, that if the 150-member requirement is considered invalid, "there is no impossibility" about complying with the requirement of separate county representation.

This Court dismissed the present appeal on October 11, 1965, 86 Sup. Ct. 75. It stated, *per curiam,* that the State court decision had been partially superseded by subsequent Federal District Court decisions with respect to the 1965 election. With this portion of the Court's decision we agree. The Court further stated: "In all other respects, the appeal is dismissed for want of a substantial federal question." As to this portion of the Court's decision we respectfully petition for rehearing.

While the special legislative election ordered by the District Court for 1965 has already been held, the Assemblymen thus elected will serve for only one year. See Order of the District Court of July 27, 1964, Jurisdictional Statement in *WMCA, Inc.* v. *Lomenzo,* October Term, 1965, No. 81, at pages B-1—B-3. Thus a new apportionment statute is needed for the regular 1966 legislative election, and quite possibly for additional elections before the New York Constitution can be amended to supersede the apportionment scheme which it now contains.

Concurring in this Court's decision of October 11, 1965 in *WMCA, Inc.* v. *Lomenzo,* 86 Sup. Ct. 24, 26, Mr. Justice Harlan stated, in part:

> "In now dismissing for lack of a substantial federal question [this] appeal . . . insofar as it may bear upon any apportionment plan effective after the expiration of the 1966 New York Legislature, I take

> it that the Court is asserting that any final apportionment plan must comport with state as well as federal constitutional requirements. . . ."*

We so read the Court's decision, and we do not see how the State courts can read it otherwise.

Until such time as the State Constitution can be amended, a process which takes at least two years,** the Legislature cannot possibly comply with both the State Constitution and the one-man, one-vote requirement. It must violate either the separate county representation requirement or the 150-member requirement, or, in the interest of achieving the best practical compromise, both. Yet, by dismissing the present appeal, the Court has, in effect, given its imprimatur to the invalidation by the State courts of any reapportionment that violates either of these State constitutional requirements.

It is true that by affirming the decisions of the District Court in *WMCA, Inc.* v. *Lomenzo,* 86 Sup. Ct. 24, *Travia*

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*Mr. Justice Harlan added in a footnote that "The Court's dismissal of this part of the appeal in 86 S. Ct. 75 [i.e., the present case] necessarily approves the Court of Appeals' holding that from the standpoint of federal law the 150-member requirement of the New York Constitution was not an integral part of the apportionment scheme invalidated in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633. . . ." We submit with deference, however, that as a matter of logical necessity both the 150-member requirement and the separate county representation requirement were integral parts of the prior scheme. When a scheme is comprised of two parts each of which is less than the whole, it is impossible for only one of the parts to be integral. In recognition of this fact, this Court held, in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. at 654, that:

> *"With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population [i.e., separate county representation], and with an additional seat given to counties having 1½ population ratios, . . . we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned." (Emphasis supplied.)

**New York Constitution, Article XIX.

v. Lomenzo, 86 Sup. Ct. 49, and *Screvane* v. *Lomenzo,* 86 Sup. Ct. 90, the Court has upheld the power of the District Court to override State constitutional requirements at least for the purpose of effectuating a temporary reapportionment applicable to the 1965 election. Presumably it is still open to the State to seek similar dispensations from the Federal courts with respect to the apportionment for further elections until the State Constitution can be amended. In fact, this seems to be what the State must do if the Court does not reconsider its dismissal of the present appeal, because of the fact that it is mathematically impossible for any apportionment under the one-man, one-vote rule to comply with the present State Constitution.

Such emergency recourse to the Federal courts does not constitute a desirable solution to the Legislature's quandary. (1) It unnecessarily and unduly constricts the Legislature in its task of reapportionment by forcing it to cleave as closely as possible to the components of the prior scheme regardless of what is now in the best interests of the State. (2) It debases acts of the Legislature by making these acts unavoidably in conflict with the State Constitution, and perhaps by making them unlawful unless and until they are rescued by a Federal court order. (3) It thus risks further head-on clashes between the State Constitution and courts on the one hand, and the Federal courts on the other.

Such clashes took place this Spring and Summer in New York, with unfortunate repercussions for our Federal system. Further clashes appear inevitable unless this Court declares once and for all that State courts cannot resurrect fragments of an invalid apportionment scheme, even when the fragment in question does not, in and of itself, offend the Federal Constitution. Under the Court's present ruling, any reapportionment that the Legislature devises must contravene one or another of such fragments.

We respectfully submit that the New York Court of Appeals has misread this Court's decision in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, that by so doing, it has created a problem of serious dimensions for the New York Legislature, and that unless this Court reconsiders its dismissal of the present appeal, the problem thus created seems certain to have a disruptive effect upon future State legislative elections.

CONCLUSION

For the foregoing reasons a rehearing should be granted, probable jurisdiction should be noted, and the judgment below should be reversed.

Respectfully submitted,

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November 5, 1965

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

.....

THOMAS E. DEWEY
Attorney for Appellants

APPENDIX

The 1960 citizen population of New York State was 16,240,786. Of the 62 counties of New York, 39 have a population of less than 100,000; 33 of these have a population of less than 75,000; 22 have a population of less than 50,000; and 5 have a population of less than 25,000. Applying the principle of one-man, one-vote, (a) an Assembly of 150 members (in which the apportionment ratio would be 108,272) would deprive at least half of the counties in New York of separate representation in the Assembly (see Supplemental Report of the Joint Legislative Committee on Reapportionment,* pages 8-15, 19-23); and (b) an Assembly in which each county received separate representation by at least one Assemblyman would require an Assembly of 1,142 members (Report of the Citizens' Committee on Reapportionment,* page 32). The population-variance ratio between the most populous and the least populous Assembly districts would necessarily be about 12.7 to 1 unless *either* of these requirements is eliminated (Report of the Joint Legislative Committee on Reapportionment,* page 6). Thus, it is mathematically impossible for any apportionment scheme in New York to comply with the requirements of one-man, one-vote, separate county representation and a 150-member Assembly.

Under a system of fractional voting, in which the Assemblymen from less populous Assembly districts would receive only a fraction of one vote in the Assembly, it would be mathematically possible to comply with all three requirements. In fact, by means of fractional voting Plans C and D both comply with the one-man, one-vote requirement and the separate county representation requirement; and while

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*These three documents are included in the record on appeal to this Court in *Lomenzo* v. *WMCA, Inc.*, October Term, 1965, No. 81, commencing at pages 439, 653 and 585, respectively, of that record.

Plan D provides for 174 whole and fractional vote Assemblymen, their combined vote is only 150. However, the fractional voting provisions of both of these Plans were invalidated by the District Court, as violative of the Fourteenth Amendment, in *Lomenzo* v. *WMCA, Inc.*, 238 F. Supp. 916, 923-924 (S. D. N. Y. February 1965). Thus, unless and until the appeal to this Court (October Term, 1965, No. 81) from that District Court decision is granted and the decision reversed, fractional voting is not available to the New York Legislature in reapportioning the State, and it would not appear to be available even on a temporary basis in the absence of further relief through some new order of the District Court.

END